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IN THE

Supreme Court of the United States

October Term 1948

No. 218

HUGH HENDERSON, Individually, and by J. WILLARD GRAGG, his Next Friend, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, W. L. MOUNT, ET AL., *Respondents.*

BRIEF AND ARGUMENT OF RESPONDENT W. L. MOUNT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

At the threshold there is presented the question of whether the Petitioners' Application for Writ of Certiorari is entitled to be considered. The petition was not filed within three months after final judgment. The order granting an extension of time within which to file the petition was, as we understand the record, based upon an applica-

tion presented not by a party to the suit or any person having legal authority.

We discuss the propositions of law covering said matters under the following points:

I. The next friend having failed to file his petition for writ of certiorari within three months after final judgment, this court is without jurisdiction to consider such petition and it should be dismissed.

II. Hugh Henderson, being insane, cannot appear individually or appoint attorneys to appear in his behalf.

III. The obtaining of an extension of time within which to file a petition for writ of certiorari by a party not of record in the courts below does not extend the time within which the next friend could file his petition.

POINT I.

THE NEXT FRIEND HAVING FAILED TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THREE MONTHS AFTER FINAL JUDGMENT, THIS COURT IS WITHOUT JURISDICTION TO CONSIDER SUCH PETITION AND IT SHOULD BE DISMISSED.

(All emphasis in this reply is ours unless otherwise stated.)

Final judgment in this case was rendered by the Supreme Court of Texas on March 17, 1848 (R. 98). The

petition for writ of certiorari was not filed until August 12, 1948 (R. frontspiece). This was nearly five months after the final judgment and the petition for writ of certiorari should be dismissed for failure to file within the three months period prescribed by law. *28 U. S. C. A., Sec. 350; Department of Banking v. Pink*, 317 U.S. 264, 87 L. Ed. 254.

In *Matton Steamboat Co. v. Murphy*, 319 U. S. 412, 87 L. Ed. 1483, this court said:

> "* * * The time within which such applications could be made is that prescribed by the statute. Its language is peremptory—'no appeal—shall be allowed or entertained unless application therefor be duly made within three months.' The purport of the words is that the appeal allowed must be one that is applied for within the three months period. * * *
>
> * * * * * *
>
> "We conclude that appellants' applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed." (pp. 414-5).

We are not unmindful of the fact that an application for an extension of time within which to file a petition for writ of certiorari was submitted to this Honorable Court and that the time was extended to August 14, 1948 (R. 98). We submit, however, that this application for extension of time shows on its face that the applicants acted without authority from J. Willard Gragg, the next

friend, to file such application in his behalf, *and they did not purport to file it in his behalf.*

In the first paragraph following the heading, the application for extension of time states:

> "Petitioners, Hugh Henderson, individually, and Orson Lee, next friend, for themselves and for J. Willard Gragg, next friend, respectfully pray for an extension of time of sixty days within which to file a petition for a writ of certiorari to review the final decision and judgment of the Supreme Court of the State of Texas, which is the highest court of said State, having jurisdiction over this case. * * * "

From the above quotation it is obvious that J. Willard Gragg was not applying for an extension of time, but rather that Hugh Henderson, individually, and Orson Lee, as Next Friend for the Next Friend, asked for the extension of time. This language was not inadvertently used, as evidenced by the further statement in the second paragraph of this application that "petitioners", as the term is used in the application, refers to "Petitioners, Hugh Henderson, individually, and Orson Lee, Next Friend (who will for convenience be hereinafter referred to as 'petitioners') ***." It was not claimed that J. Willard Gragg, Hugh Henderson's next friend, was one of the petitioners. It therefore follows that every statement made in this application, including the prayer for an extension of time, was made for and on behalf of "petitioners", to-wit: "Hugh Henderson, individually, and Orson Lee,

Next Friend". The fourth paragraph on page 2 of the application reads as follows:

> "Petitioners further state that through his original attorneys, John H. Haley, of Bowling Green, Missouri, and George W. Anderson of McDonald & Anderson of Wichita Fall, Texas, appearing for him and for his chosen next friend, Orson Lee, he did attempt to persuade the attorneys representing J. Willard Gragg, next friend appointed by the District Court of Clay Cou.:y, Texas, to prosecute an application for certiorari to this, the Supreme Court of the United States. But petitioner states that *no final decision was given by said next friend* and his attorneys until petitioner's chosen counsel was informed on April 9, 1948, by letter, of said date, which did not reach his counsel in Missouri until April 12, 1948, *that they have so far declined to go further in the matter*, but they would have no objection to petitioner Henderson proceeding therein in his own behalf and with his chosen attorneys; but petitioners are hopeful that said counsel will continue to prosecute for the cause and join herein in the event this application for Extension of Time is granted." (Emphasis supplied)

It will be noted from the above quoted paragraph of the application that J. Willard Gragg, Hugh Henderson's next friend appointed by the court below, and the next friend's attorneys did not deem it advisable to file an application for writ of certiorari in this court and had failed to do so prior to the expiration of the three months period. It further appears from this paragraph that petitioners were hopeful that if the extension was obtained

they would be able to convince the next friend and his attorneys that an application for writ of certiorari should be filed. We respectfully submit that the application for extension of time shows on its face that the attorneys who filed it did not represent or purport to represent J. Willard Gragg, Hugh Henderson's next friend. The extension of time was not, therefore, effective as to J. Willard Gragg, the next friend, and this court is without jurisdiction to consider the petition for certiorari filed by him more than three months after the final judgment, and the petition should be dismissed as to him.

POINT II.

HUGH HENDERSON, BEING INSANE, CANNOT APPEAR INDIVIDUALLY OR APPOINT ATTORNEYS TO APPEAR IN HIS BEHALF.

The petition for writ of certiorari purports to have been filed on behalf of Hugh Henderson individually. Likewise, as shown above, the application for extension of time within which to file such petition recites that it was filed on behalf of Hugh Henderson individually. Hugh Henderson is a person of unsound mind. The original application for certiorari from district court to county court alleged that he had been a person of unsound mind for more than 30 years (R. 2). This petition was filed by Orson H. Lee as next friend and by Hugh Henderson individually (R. 1). Pursuant to a motion filed by M. L.

Henderson, the then guardian (R. 8), the District Court of Clay County, Texas, found that Hugh Henderson was a person of unsound mind and therefore could not prosecute this action individually or employ attorneys to prosecute it for him. In this connection the court found:

> "The court finds, adjudges and decrees that the said Hugh Henderson is now and has been at all times material to this controversy a person of unsound mind and is without sufficient mental capacity to manage his own affairs, (fol. 78) and he has not now, and did not have at the time of the institution of this suit, sufficient mental capacity to determine whether it was to his best interest to institute and prosecute this proceeding, and, that he has not now and did not have sufficient mental capacity to prosecute this proceeding and that he has not now, and has not had during the times material to this controversy sufficient mental capacity to employ attorneys for the prosecution of this proceeding. It is accordingly adjudged and decreed that the Hon. C. C. McDonald and Hon. Geo. W. Anderson, who compose the law firm of McDonald & Anderson, had no authority to institute and have no authority to prosecute this proceeding as attorneys for Hugh Henderson." (R. 9, 10)

This order was appealed to the Court of Civil Appeals where it was affirmed, Henderson, et al, vs. Shell Oil Co., Inc., et al, 179 S. W. (2d) 386, and to the Supreme Court of Texas, which held it was not an appealable order, Henderson, et al, vs. Shell Oil Co., Inc., et al, 143 Tex. 142, 182 S. W. (2d) 994. Likewise the judgment now on appeal

found that Hugh Henderson was a person of unsound mind (R. 36, 38). That finding of fact was not attacked in the state courts and is not being attacked in this court.

Being a person of unsound mind, Hugh Henderson could not authorize the attorneys who purport to represent him individually to appear for him in this case either for the purpose of filing a petition for writ of certiorari or to secure an extension of time within which to file such petition. *McLean v. Burkinshaw* (Ct. of App., D. C.), 107 Fed. (2d) 665, 71 App. D. C. 107 (certiorari denied 309 U.S. 670, 84 L. Ed. 1016, 60 Sup. Ct. 616). That case involved proceedings concerning the insanity of McLean, wherein George B. Fraser filed an answer as attorney for McLean. On motion of the ancillary committee of the person and estate of McLean, the answer was stricken on the ground that Fraser had no authority to represent McLean, since he was a person of unsound mind. In affirming the action of the trial court, the Court of Appeals, in referring to McLean, said:

> "If he is insane, his insanity has ended any authority which he may ever have given to Fraser." (2. C. 665 Fed.)

The court further found that "Fraser's lack of authority appears on the face of the record."

Sullivan vs. Dunne, 198 Cal. 183 (Sup. Court of Calif.) was a petition for mandamus filed in the Supreme Court to require the trial court to approve the record so that peti-

tioner could appeal from an order appointing the guardian for an incompetent. The children of Sullivan had filed an application for guardianship over him. One Troy, an attorney, filed pleadings resisting the application. A hearing was had in the trial court and that court found that Troy had no authority to represent Sullivan and struck his pleadings. Later on after the guardianship appointment was made Troy filed on behalf of Sullivan a notice of appeal and then sought to require the chancellor to approve the record. It was held that the determination of the authority of the attorney and the mental capacity of Sullivan was for the trial court; that where an attorney is not authorized his assumed client can base no rights on his acts; that the claim of the attorney to represent the client in another case is of no moment as authority in one suit is no evidence of authority in another; that if authority had been given when Sullivan was of sound mind it would cease on his becoming of unsound mind; that the attorney could not urge the right to represent Sullivan as an amicus curiae; that the acts of the attorney in filing notice of appeal and preparing the record were ineffectual; and that the attorney in his individual capacity had no power to appeal such judgment.

And in the connected case of In re: *Sullivan*, 198 Cal. 183 (Sup Court of Calif.) the appeal so perfected by the attorney was held to be void and was dismissed.

These cases are directly in point. Hugh Henderson was a person of unsound mind and had been for more than

30 years. He could not authorize any attorney to appear in his behalf and the lack of authority of the attorneys filing the application for extension of time to represent Hugh Henderson *individually* appears on the face of the record.

This court has power at any stage of a case to require an attorney, one of its officers, to show his authority to appear. *Pueblo of Santa Rosa v. Fall*, 273 U. S. 315, 47 Sup. Ct. 361, 71 L. ed. 658. In that case this court said:

> "The question as to the authority of counsel was raised by motion to dismiss filed with answer. There was a hearing upon the motion, but the trial court of its own accord postponed a decision upon it until final hearing on the merits, an order clearly within its discretion. Whether, as a a matter of practice, the challenge to the authority of counsel was seasonably interposed, it is not important to decide, for in any event, the trial court, or *this court, has power, at any stage of the case, to require an attorney, one of its officers to show his authority to appear.* * * *" (P. 319)

We do not intend to cast any reflections upon the attorneys who applied for the extension of time within which to file the petition for writ of certiorari. They did not misstate their case. They did not purport to act on behalf of Willard Gragg, but rather on behalf of Hugh Henderson *individually* and Orson Lee as his next friend, but we submit that as a matter of law, for the reasons set out above, Hugh Henderson could not authorize them

to represent him individually and, as we shall hereafter show, Orson Lee has no standing in this case. On the other hand, this court at the time it granted the extension did not have before it the record in this case, which conclusively shows Hugh Henderson's insanity and also the removal of Orson Lee as next friend and the appointment of J. Willard Gragg in his stead.

The petition for writ of certiorari should be dismissed in so far as Hugh Henderson individually is concerned, since a petition filed by attorneys without authority is a mere nullity and Hugh Henderson, being insane, could not authorize attorneys to appear for him individually.

POINT III.

THE OBTAINING OF AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI BY A PARTY NOT OF RECORD IN THE COURTS BELOW DOES NOT EXTEND THE TIME WITHIN WHICH THE NEXT FRIEND COULD FILE HIS PETITION.

The application for extension of time within which to file a petition for writ of certiorari was not only in the name of Hugh Henderson individually, but also in the name of Orson H. Lee, who purported to appear as next friend for Hugh Henderson. Petitioner's application for certiorari from District Court to County Court, as original-

ly filed in the District Court of Clay County, Texas, was filed by Orson H. Lee as next friend of Hugh Henderson (R. 1). Thereafter, on August 21, 1943, M. L. Henderson, the then guardian of Hugh Henderson's Texas estate and during his lifetime one of the defendants in this action, filed a motion in the District Court attacking Orson Lee's right to represent Hugh Henderson as next friend on the ground he was a mere interloper and not interested in the welfare of Hugh Henderson (R. 8). A hearing was had on this motion and, on October 22, 1943, the District Court of Clay County, Texas, in removing Orson H. Lee as next friend and appointing J. Willard Gragg in his stead, said:

> "The court further finds, adjudges and decrees that the said Orson H. Lee is not related to Hugh Henderson by blood or marriage, and is not a friend of the said Hugh Henderson, and has no interest in his welfare, and that he is an utter stranger to the next of kin and other relatives of the said Hugh Henderson, and that he is not a suitable and is not a proper person to act herein as next friend of the said Hugh Henderson, and that he has no other legal capacity to maintain this proceeding. It is, therefore, further ordered, adjudged and decreed that the said Orson H. Lee be and he is hereby removed as next friend of the said Hugh Henderson and he will not be permitted to conduct this litigation on behalf of the said Hugh Henderson." (R. 9, 10-11)

At all times subsequent to October 22, 1943, J. Willard Gragg and not Orson H. Lee has acted as next friend of Hugh Henderson. (R. 34).

Orson H. Lee was not a party to the trial in the District Court of Clay County, Texas, either individually or as next friend of Hugh Henderson. (R. 33-4). Neither was he a party in the Court of Civil Appeals nor in the Supreme Court of Texas, and it will be noted from the petition for writ of certiorari that he is not even a party in this court. He had no connection with this case in the appellate courts of Texas and his only connection with the present case in this court was to request an extension of time within which to file a petition for writ of certiorari. This brings us to the question of whether Orson Lee, a stranger to this action, may obtain a valid extension of time within which to file a petition for a writ of certiorari.

A similar question was before the Supreme Court of California in *Title Ins. & Trust Co. v. California Development Co., et al.*, 168 Cal. 397, 143 P. 723. The notice of appeal in that case was signed by certain attorneys who, while acting in good faith, were in fact without the authority which they believed they had and which they assumed to exercise. After the time for appeal had expired the company ratified the unauthorized action of these attorneys. In holding that the ratification was ineffective and that the appeal was not taken in time, the Court said:

> "* * * The filing of the notice of appeal by the attorneys was not the act of the California Development Company, and that corporation, therefore, did not take an appeal within the time limited by law. The resolution of ratification cannot alter the situation. * * * With the lapse of six months from the

> entry of the judgment, the judgment became final as against all parties who had not appealed. No appeal had then been taken by California Development Company. The right of the successful parties to maintain the judgment against it could not be taken away by a subsequent ratification. To hold the contrary would amount to allowing this defendant to take an appeal nine months after the entry of judgment, whereas the statute clearly limits the right to six months. This court has no jurisdiction of an appeal taken too late, and the jurisdiction, once gone, cannot be revived by any act done after the expiration of the time limited. The purported appeal of the California Development Company cannot therefore stand." (2. c. 724-1. c. 725)

In *Forrest vs. Hawkins*, 169 Va. 470 (Sup. Court of Va.) there was a motion to dismiss the appeal. The statute provided that a writ of error bond should be given within six months after judgment and that the bond should be signed by the principal under seal or by some one else having authority from the principal under seal. A bond was filed within the six months period but it was signed by appellant's attorney signing appellant's name and there was no authority under seal. After the expiration of the six months the appellant Forrest sought under seal to ratify this bond. It was held that it could not be done. The Court said:

> "The same principle applies here. Forrest was powerless, after the expiration of time for perfecting the writ of error, to cure the defect by ratifying the unauthorized act of the agent. It is well

> settled that his ratification will not relate back so as to impair or defeat the rights of third parties which have intervened between the time of the doing of the unauthorized act and its ratification. 2 Am. Jur. Agency, Sec. 211, p. 168; 2 C.J.S. Agency, Sec. 65, p. 1144."

The writ of error was dismissed.

The notice of appeal in the Califorina case was a necessary prerequisite to the jurisdiction of the Supreme Court of that state just as the extension time in the case at bar is necessary prerequisite to the jurisdiction of this Court, and we submit that, as was stated by the Supreme Court of California, "this Court has no jurisdiction of an appeal taken too late and the jurisdiction, once gone, cannot be revived by any act done after the expiration of the time limited." And as held by the Supreme Court of Virginia, the appellant is powerless after the expiration of the time for perfecting a writ of error to cure the defect by ratification. It, therefore, follows that even if the act of J. Willard Gragg, the next friend, in filing his petition for certiorari be considered as a ratification of Orson Lee's application for an extension of time, such ratification cannot alter the situation.

That a ratification cannot relate back so as to defeat the intervening rights of third parties is estabilised in this Court.

Cook vs. Tullis, 85 U. S. 332 (21 L. Ed. 933) involved the validity of the ratification by the owner of the act

of his bank in withdrawing the owner's bonds and substituting a promissory note owned by the banker. The Court held that the rights of third parties were not prejudiced in that case but in speaking of ratification said:

> "The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parcisely as though authority to do the act had been ties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."

Such is also the law of Texas. *Texas Moline Plow Co. vs. Clapproth*, 209 SW 392, Comm. of Apps.—holdings approved by Texas Supreme Court.

Orson Lee was not a party in the courts below either individually or as next friend of Hugh Henderson, and, as was stated by Mr. Chief Justice Tanney, in *Payne v. Niles*, 20 How. 219, 15 L. ed. 895:

> "Writs of error to remove the judgment of an inferior tribunal to this court are, under the Act of Congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an

inferior court to a superior one, unless he was a party to the judgment in the court below; * * * Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co. and Knox, to which they were not a party, * * *

"This writ of error attempts to do both, and is therefore not warranted by law.

"It cannot bring the judgments referred to, or either of them, before this court, and must, therefore, be dismissed with costs." (p. 221).

We also refer the Court to *Bayard vs. Lombard*, 50 U. S. 530, 13 L. ed. 245.

This question was also before this court in *Ex Parte Dorr*, 3. How. 103, 11 L. ed. 514, where it was held that an application for writ of error to review a conviction in a state court cannot be granted wherein it is prayed for without the authority of the prisioner, but at the request of his friends, although personal access to the prisoner to ascertain whether he desired such writ had been refused. In the opinion this court said:

"The counsel in this application prays for a writ of error, but as it appears from his own admission that he does not act under the authority of Dorr, but at the request of his friends, the prayer cannot be granted. In the view it is unnecessary to decide whether the counsel has stated a case, which, with the authority of his client, entitles him to a writ of error." (pp. 105-6).

In Texas it is held that amicus curiae cannot effectively give notice of appeal. *Greathouse vs. Fort Worth &*

Denver City Ry. Co., 65 SW (2) 762, Com. of Apps.—holdings approved by the Supreme Court of Texas. Also *Southern Ry. Co. vs. Locke*, 84 SW 1069, Tex. Civ. Apps.

In closing this point we respectfully submit that Orson H. Lee was a stranger to this action in the Texas courts and that as such stranger the extension of time obtained by him is a mere nullity.

We submit:—

First: That Hugh Henderson, being insane, may not appear personally in this case or employ counsel to appear in his behalf, and the extension of time within which to file a petition for writ of certiorari is a mere nullity in so far as it purports to be filed by attorneys selected by this insane person;

Second: That Orson H. Lee is a stranger to this action and a stranger may not file a petition for writ of certiorari or secure an extension of time within which to file such petition; and

Third: That the only petitioner who was a party in the appellate courts of Texas was J. Willard Gragg, next friend of Hugh Henderson. He was the only person authorized to represent Hugh Henderson. He was the only person who could apply to this court for a writ of certiorari. Likewise, he was the only person who could apply for an extension of time within which to file his petition for certiorari.

REPLY TO THE MERITS:

This Respondent believes that the court has not acquired jurisdiction to issue the writ because of the matters heretofore discussed. If Respondent be mistaken in this, then he submits the following brief reply on the merits:

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR A.

(a) Contrary to petitioner's contention in specification of Error A (Brief 17), this court held, in *Chaloner v. Sherman*, 242 U.S. 455, 61 L. ed. 427, and the Supreme Court of Texas held in the case at bar (R. 89, 91-92), that statutes permitting the appointment of guardians of nonresident persons of unsound mind who had not theretofore been adjudicated incompetent do not violate the Federal Constitution. These cases are a complete answer to Petitioner's Specification of Error A.

(b) The District Court found that Hugh Henderson was adjudicated insane by a Missouri court of competent jurisdiction on March 6, 1908 (R. 35) and there is no evidence of his restoration to sanity. Therefore, no Federal question is even raised by the facts.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR B.

(a) Contrary to petitioner's contention in Specification of Error B (Brief 17), this court held in *Jones v.*

Prairie Oil & Gas Co., 273 U. S. 195, 71 L. ed. 602, and in *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, that the appointment of a guardian of the estate on constructive notices does not violate the Federal Constitution, although the contention was made in the Cunnius case that there must be a prior seizure of the property. The filing of the petition for the appointment of a guardian gave the County Court of Clay County jurisdiction over Hugh Henderson's Texas estate. *Wootters v. Wynne* (Civ. App. Tex.), 7 SW (2d) 940 (no writ).

(b) Hugh Henderson personally appeared in the County Court (R. 60) and also in the District Court (R.37). These personal appearances made personal service unnecessary. *12 C.J. 1233.* Therefore, the question of whether personal service is necessary is not even raised by the facts.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR C.

(a) Contrary to petitioner's contention in Specification of Error C (Brief 17), this court held in *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 71 L. ed. 602, supra, and in *Cunnius v. Reading School District*, 198, U. S. 458, 49. L. ed. 1125, supra, that personal service is not necessary to appoint a guardian of the estate and the Supreme Court of Texas so held in the case at bar (R. 92).

(b) As shown above, petitioner's personal appearance in the County Court (R. 60) as well as his appearance in the District Court by invoking its jurisdiction (R. 37) was equivalent to personal service of process, if that be required.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR D.

(a) This specification of error (Brief 17) is a reiteration of Specification of Error C in so far as personal service is required. The Supreme Court of Texas held in the case at bar that under the laws of that state a proceeding for the appointment of a guardian is an action in rem or quasi in rem (R. 92), and this court held to the same effect in *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 71 L. ed. 602, supra, and in *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, supra.

(b) While, as pointed out in the brief of respondent Shell, a guardianship proceeding is in rem, that question is not material here, since petitioner's personal appearance in the County Court (R. 60) and also his legal appearance in the Distirct Court (R. 37) was sufficient even in a proceeding in personam. *12 C.J. 1233.*

We respectflly submit that J. Willard Gragg, the next friend appointed by the court, having failed to file his petition for writ of certiorari within the three months period prescribed by law and having failed to obtain an

extension of time within which to file such petition, this court is without jurisdiction and the petition for writ of certiorari should be dismssed. We further submit that even if the petition shoud be considered that the same is without merit and the writ should not be granted.

RESPECTFULLY SUBMITTED,

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